FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 409

HENRY C. RIELY and ROBERT T. BARTON, JR., as Receivers of PIERCE OIL CORPORATION, a Virginia Corporation, heretofore dissolved,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

EUGENE UNTERMYER,
ROBERT T. BARTON, JR.,
Attorneys for Petitioners.

CASES CITED

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Respondent's brief in opposition to the Petition for Certiorari, although due December 29, 1948, was not received by petitioners' counsel until January 4, 1949, due to service of respondent's brief upon the wrong attorney in Washington.

Respondent proceeds on the assumption that the only question at issue is one of local law but we are satisfied that our Petition and Brief conclusively establish that the issue before this Court is not so narrowly circumscribed.

Nevertheless, Rule 38(5)(b) includes among the controlling factors that may impel a writ, that the Court of Appeals

> "has decided an important question of local law in a way *probably* in conflict with applicable local decisions." (Emphasis ours.)

The Court of Appeals has decided that the Virginia statute permits payment of dividends in the face of a capital impairment. Reference by respondent in footnote 3 to *Johnson* v. *Johnson & Briggs,* 138 Va. 487, upon which we have relied, to the effect that "dividends must be declared out of earnings", does not impair the immediately previous statement of the Court which our Brief quotes at page 16 *that capital cannot be impaired by the declaration of dividends.* This is all for which we contend in urging that the Virginia law as construed by the highest Court reveals error in the decision of the Court of Appeals, since accumulation of insufficient earnings to restore a previously sustained deficit still leaves a capital impairment, which is the situation here.

Nor need we digress further to establish that the question is indeed an *important* one to the Bench, the Bar and the directors of every corporation who may be faced with a capital impairment, not only in Virginia but in the seven other States that have the same form of statute on the subject.

Respondent's footnote 4, in referring to the unambiguous views of this Court in *Mobile & Ohio Railroad Company* v. *Tennessee,* 153 U. S. 486, appears to beg the question. (See quotation at page 10 of our Petition.) In that case, this Court expressed itself very clearly in relation to a matter governed by State enactment under our system of jurisprudence, but the views this Court expressed so manifestly contradict the conclusion of the Court of Appeals as to impel review under that portion of Rule 38(5)(b) that refers to a decision "probably in conflict with applicable decisions of this court".

Notwithstanding respondent's efforts glibly to dismiss our assertion that the Court below has

> "so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision,"

we are satisfied and urge with conviction that the record fully establishes that the last of the grounds justifying this petition as set forth in Rule 38(5)(b) has been fully established for reasons that there is now no occasion to reiterate (see our Petition, p. 11, and Brief, pp. 26 et seq.).

Respondent has not seen fit to comment with respect to the other grounds we have urged in support of the writ. The effort of the Court of Appeals to distinguish the conflict established by the decision in *Glenn* v. *Mengel Co.* (C. C. A. 6th), 145 F. (2d) 235, affirming 50 Fed. Supp. 765, does not make the actual existence of that conflict any the less real, as analysis of those opinions will establish.

Since filing our petition and brief, the November 1948 number of the Harvard Law Review, Vol. 62, No. 1, has also criticized the decision of the Court of Appeals, at page 130 et seq.

The basis of its criticism is that the Virginia statute contains no provisions whatever protecting creditors or stockholders against continued distribution of dividends in the face of a capital impairment.

The Editors' Note refers to the trend indicated by the enactment of the Delaware type of statute and similar statutes in some seven other states (our Brief, pp. 21-25) which *explicitly* permit payment of dividends in the face of a capital impairment, but emphasizes that each one of those statutes contain very definite safeguards (1) to creditors against depletion of assets, (2) to investors against misrepresentation of prosperity by dividend payments which are, in fact, return of capital, and (3) to the various classes of shareholders against inequitable treatment *inter se*.

The Note terms this type of distribution so explicitly authorized as "nimble dividends" and concludes, in relation to the decision of the Court of Appeals:

> "The critical feature of the (Virginia) statute in the instant case is the total lack of any such safeguards. In the absence of a clearly expressed in-

tention of the legislature, a court should find no authorization for nimble dividends unless adequate protection to investors and creditors is provided."

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be granted.

Dated, January 5, 1949.

Respectfully submitted,

EUGENE UNTERMYER,
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